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No. 235

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

FERRO, INC., and BOLLING R. POWELL, JR.,
Petitioners,

v.

JOHN THOMPSON BEACON WINDOWS, LTD.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Ferro, Inc., and Bolling R. Powell, Jr.,
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v.

John Thompson Beacon Windows, Ltd.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a Writ of Certiorari issue for review of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on April 28, 1960.

Citation of Opinion Below

The opinion of the Court of Appeals for the District of Columbia Circuit is printed in the Appendix hereto and is not yet reported in the Federal Reporter System. The opinion of the United States District Court for the District of Columbia, filed under date of November 17, 1959, is set forth on pages 17-22 of the Joint Appendix printed for the use of the Court of Appeals for the District of Columbia Circuit, which Joint Appendix is certified as part of the record in connection with this Petition for Certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on April 28, 1960, and petition for rehearing was denied June 13, 1960. Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

Question Presented

Whether in the District of Columbia the undisputed fact that a corporation not in receivership or bankruptcy repays a *bona fide* debt to its chief executive and controlling stockholder at a time when it is unable to pay the disputed claim of another creditor renders the repayment of the *bona fide* debt void, *per se*, as a matter of law under Title 12, Sec. 401, District of Columbia Code, as a conveyance to hinder, delay or defraud the creditor whose disputed claim was not paid.[1]

Statute Involved

The statute involved is Title 12, Sec. 401, District of Columbia Code (1951) which reads as follows:

> "*Fraudulent Conveyances.*
>
> Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or rents and profits issuing from the same, or in goods or things in action, and every charge upon the same, and every bond or other evidence of debt given, or judgment or decree suffered, with the intent to hinder, delay, or defraud creditors or other persons having just claims or demands of their lawful suits, damages, or demands, shall be void as against the persons so hindered, delayed, or defrauded: *Provided*, That nothing herein shall be construed to affect or impair the title of

[1] The District Court stated in its opinion. (Joint App. p. 20), "The precise question concerning the preference of a person who is a director and sole shareholder of an insolvent corporation has not been decided in the District of Columbia."

a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor: *Provided further*, That the question of fraudulent intent shall be deemed a question of fact and not of law." (Mar. 3, 1901, 31 Stat. 1368, ch. 854, § 1120)

Statement

On November 21, 1957, respondent herein instituted this action alleging that Ferro, Inc.'s payment of $12,030.76 to Powell in March 1954, some three years and eight months prior to the institution of this suit, was void as a fraudulent conveyance. Ferro, Inc., and Powell asserted the defenses of the applicable three-year statute of limitations (which was not even considered by the Court of Appeals) and that the payment by Ferro, Inc., to Powell was not a conveyance to hinder, delay or defraud creditors because it was the bona fide repayment of cash funds previously loaned by Powell to Ferro, Inc., prior to the time Powell became the corporation's chief executive officer and controlling stockholder. The District Court had jurisdiction pursuant to Title 11, § 306, D. C. Code 1951. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

The District Court found that the payment by Ferro, Inc., to Powell was in fact the repayment of *bona fide* indebtedness the corporation owed him for cash funds loaned by him to the corporation.

It was undisputed that at the time of repayment Powell, in addition to being a *bona fide* creditor of the corporation, had also become vested with complete control of the corporation and because of this position obtained the repayment of the corporation's indebtedness to him, thereby rendering the corporation unable to pay the disputed

claim of John Thompson Beacon Windows, Ltd.[2] It was solely on these undisputed facts that the District Court based its erroneous conclusion of law that the repayment to Powell was void under Title 12, Sec. 401, District of Columbia Code, as having been made to "hinder and delay" the corporation's other creditor, Beacon Windows, Ltd. No decisions were cited by the District Court supporting this conclusion of law and there are none that do support it.

The Court of Appeals in its hasty consideration of the case affirmed the District Court's erroneous conclusion of law on the inapplicable ground that it was "not clearly erroneous"—as if the District Court's decision was based upon a finding on disputed facts. There being no dispute on these facts, the question for the Court of Appeals to decide was one of law.[3] A question of law, of course, cannot be decided on the ground that the lower court's decision on the question of law was "not clearly erroneous."

Thus, on the inapplicable and unjudicial ground that it is "not clearly erroneous," the three-sentence *per curiam* decision of the Court of Appeals has the effect of establishing new law in the District of Columbia that it is a fraudulent conveyance *per se* for a corporate debtor which is neither in receivership or bankruptcy to prefer a *bona fide* debtor who is also its chief executive officer and controlling stockholder when by doing so it is rendered unable to pay the disputed claim of another creditor.

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[2] This disputed claim of Beacon Windows, Ltd., was later reduced by arbitrators from $21,336 to $10,786.20.

[3] As pointed out by Professor Garrard Glenn in his authoritative book *The Law of Fraudulent Conveyances*, (Sec. 6, p. 10) in discussing statutes, such as D. C. Code § 12-401, making the question of the grantor's intent one of fact: "Where, in the given case, there is no real dispute of fact, the question becomes one of law."

This holding is in patent conflict with the fundamental principles of the law of fraudulent conveyances laid down by the United States Supreme Court in the following decisions, among others:

Huntley v. *Kingman and Co.*, 152 U.S. 525, 14 S.Ct. 688, 38 L.Ed. 540 (1894) wherein on the question of a debtor preferring a creditor the Supreme Court held:

> "It is entirely well settled in England and America, that at common law a debtor in failing circumstances has a right to prefer certain creditors, to whom he is under special obligation, though by such preference the fund for the payment of the other creditors be lessened, or even absorbed." (pp. 691-692)

Merillat v. *Hensey*, 221 U.S. 333, 31 S.Ct. 575, 577, 55 L.Ed. 578 (1911), which arose in the District of Columbia under the same statute here involved, wherein on the question of a debtor preferring a creditor the Supreme Court held:

> "It is then said that the assignor was at the time insolvent and intended to prefer the assignees, and that they knew it. This would be effective if bankruptcy had ensued within four months, and the trustee had sought to set it aside as a preference; but that on one side it is neither immoral nor illegal for a failing debtor to prefer one creditor over another." (p. 577)

Davis v. *Schwartz*, 155 U.S. 631, 15 S.Ct. 237, 39 L.Ed. 289 (1895) wherein on the question of a debtor preferring a creditor in close relationship to him the Supreme Court held:

> "The fact that the assignee of the preferred creditor of an insolvent debtor is a relative or intimate friend is doubtless calculated to excite suspicion; yet in reality there is nothing unnatural in a dealer or trader who is in need of credit, or a loan of money to carry on his business, first applying to his relatives for such loans, and if the evidence be undisputed that the money was advanced, the fact that the per-

> sons making the loan are relatives ought not to debar them from receiving security. Their rights are neither increased nor diminished by the fact of relationship [citing cases.]" (p. 240)

Sanford Fork & Tool Company v. Howe, Brown and Company, 157 U.S. 312, 15 S.Ct. 621, 39 L.Ed 713 (1895), which involved an insolvent corporation's preferring its own officers as creditors. The Supreme Court held this did not constitute a fraudulent conveyance, stating:

> "The case involves no breach of trust on the part of the agent towards the principal, but more closely resembles the case of an individual debtor giving preference to certain of his friends, and the general rule is that, in the absence of statute, a debtor has such *jus desponendi* in respect to his property that, although insolvent, and contemplating a cessation of business, and the surrender of his property to his creditors, he may lawfully prefer certain of them, even though thereby others receive no payment." (p. 623)[4]

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[4] No less an authority than the late Professor Garrard Glenn in his book, *The Law of Fraudulent Conveyances* (1931), summarizes the law of fraudulent conveyances as follows: "Now, if there is one point more ungrudgingly accepted than others, it is that a preferential transfer does not constitute a fraudulent conveyance. Th 'past consideration' is the 'good consideration' that the Statute of Elizabeth requires; and that is repeated in the section of the uniform law quoted at the head of this chapter. 'The intent of the statute,' as has been said, 'is not to provide equal distribution of the estates of debtors among their creditors; there are other statutes which have that effect.' Those 'other statutes' are the laws relating to bankruptcy and kindred proceedings of another name. (p. 387)

* * * *

". . . The fact that a corporation was present made no difference in the point of view which the principles on discussion enables us to take.

"The Uniform Fraudulent Conveyance Act makes no mention of the corporate debtor, although it devotes two sections to the partnership. The reason is apparent. All we have to grasp is the idea that the doctrine of fraudulent conveyances is in no wise affected by any point that appears in the law of corporations." (p. 565)

Reasons for Granting the Writ

1. The undisputed facts involved herein make this a case of first impression in the District of Columbia and present for decision an important question of law.

2. The decisions rendered in this case by the United States District Court and by the Court of Appeals below are erroneous in that they are in conflict with the basic principles of the law of fraudulent conveyances as previously decided by the United States Supreme Court both under Title 12, Sec. 401, of the District of Columbia Code as well as under the federal common law of fraudulent conveyances which sprang from the Statute of Elizabeth (Stat. 13 Eliz., ch. 5).

3. The Court of Appeals below in its hastily considered three-sentence *per curiam* opinion has further erred in affirming the District Court's erroneous conclusion of law, which was based on undisputed facts, upon the inapplicable ground that it is "not clearly erroneous."

Conclusion

This case presents in a posture ripe for determination an important question of law of first impression in the District of Columbia which has been decided erroneously by the Court of Appeals in direct conflict with long-standing principles of the law of fraudulent conveyances laid down in the previous decisions of the United States Supreme Court. Furthermore, in disposing of a question of law solely on the inappropriate basis that the District Court's holding thereon was "not clearly erroneous" the Court of Appeals has committed a serious error in judicial administration and procedure which should be corrected by the United States Supreme Court.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15533

FERRO, INC., and BOLLING R. POWELL, JR., APPELLANTS

v.

JOHN THOMPSON BEACON WINDOWS, LTD., APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided April 28, 1960

Mr. Bolling R. Powell, Jr., for appellants.

Mr. John J. Sexton, with whom *Mr. Harry M. Plotkin* was on the brief, for appellee.

Before Mr. Justice Reed, retired,* and Edgerton and Bastian, *Circuit Judges*.

Per Curiam: Appellant Ferro, Inc., an insolvent corporation, paid its debt to Powell, its sole stockholder and managing director. The District Court found that this transfer of the corporation's funds was made with intent "to hinder or delay" appellee, a creditor. The finding is not clearly erroneous and supports the court's conclusion that the transfer was void as against appellee under D.C. Code § 12-401.

Affirmed.

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* Sitting by designation pursuant to 28 U.S.C. § 294(a).

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 235

[redacted]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 235

FERRO, INC., and
BOLLING R. POWELL, JR.,
Petitioners

vs.

JOHN THOMPSON BEACON WINDOWS, LTD.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The District Court [1] held that the payment by an insolvent corporation of a debt owed to its managing officer-sole stockholder can be set aside at the suit of a third party creditor upon either of two independent grounds:

(1) A preference of an insider-creditor as against an outsider-creditor by an insolvent corporation is void-

[1] The opinion of the District Court appears at pp. 17-22 of the Joint Appendix filed in the Court of Appeals.

able at common law, being in violation of the fiduciary duty of a corporate officer to creditors. In so holding, the District Court, although deciding an issue previously undecided in the District of Columbia, followed the rule which is well established in thirty states in the United States. 2 Glenn, "Fraudulent Conveyances and Preferences" (Rev. Ed. 1940) § 386; 15A Fletcher, "Cyclopedia of the Law of Private Corporations" (1938 Ed.) §§ 7468-7471.

(2) The District Court found as a fact that the insider-creditor intended to hinder or delay the corporation's other creditor within the meaning of the District of Columbia Fraudulent Conveyance Act (D. C. Code, § 12-401) and that therefore the transfer of funds from the insolvent corporation to the insider was a fraudulent conveyance, void as against the outsider-creditor.

The Court of Appeals (Mr. Justice Reed and Edgerton and Bastian, J.J.), in a *per curiam* opinion, affirmed the judgment of the District Court on the ground that the District Court's finding of fact that the insider intended to hinder or delay the corporation's creditor was not clearly erroneous and that such finding supported the District Court's conclusion that the transfer was void as against the creditor under the Fraudulent Conveyance Act. The Court of Appeals subsequently denied a petition for rehearing.

The writ of certiorari should not be granted because the lower courts have merely decided an issue of local District of Columbia law. Furthermore, the result reached by the lower courts is in conformity with the present rule in thirty states, as well as with basic principles of equity and justice. After a full trial which included many exhibits and testimony by the insider-creditor (called by the plaintiff-respondent as a hostile witness) the District Court found as a fact that the in-

sider "certainly" intended to hinder or delay the creditor within the meaning of the Fraudulent Conveyance Act. In appealing the judgment to the Court of Appeals, the defendant-petitioner chose to include in the record on appeal only a few of the exhibits and no part of the transcript of oral testimony. On such record, it cannot be said that the District Court's finding of fact was "clearly erroneous" within the meaning of Fed. R. Civ. P. 52(a).

The decision of the lower courts does not conflict with any decision of this court. Three of the cases cited in the petition [2] stand for no more than that a debtor may prefer one non-insider-creditor over another. The opinion of the District Court recognized this general rule but noted that the instant case involves a preference by an insolvent corporation of an insider-creditor over an outsider-creditor, which the courts have generally disapproved.[3] In the final case cited,[4] security was given by an insolvent corporation to an insider in return for fresh consideration. The Supreme Court expressly noted (p. 318) that the case did *not* involve a preference

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[2] Huntley v. Kingman and Co., 152 U.S. 527, 14 S. Ct. 688, 38 L. Ed. 540 (1894); Merillat v. Hensey, 221 U.S. 333, 31 S. Ct. 575, 55 L. Ed. 758 (1911); Davis v. Schwartz, 155 U.S. 631, 15 S. Ct. 237, 39 L. Ed. 289 (1895).

[3] The District Court opinion stated (J.A. 19): There are cases in this jurisdiction which hold the common law rule that a person or corporation may prefer creditors as long as the preference is not clearly fraudulent. Merrillat v. Hensey, 221 U.S. 333. These cases can be distinguished from the instant suit in that none of the cases involve the preference of a person who is the sole shareholder, sole controlling manager, and a director of the Corporation by the corporation he owns and controls.

[4] Sanford Fork and Tool Company v. Howe, Brown and Company, 157 U.S. 312, 15 S. Ct. 621, 39 L. Ed. 713 (1895).

by an insolvent corporation of an insider for past consideration only. The latter situation is the instant case.

Turning on particular facts, not in conflict with any other decision, and being a ruling as to local District of Columbia law, the decision below presents no question of general importance requiring review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,
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